

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0464-R**

*Reconsideration Granted*  
*Appeals Board Decision 2017-EAB-0464 Adhered to on Reconsideration*

**PROCEDURAL HISTORY:** On December 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 142117). The employer filed a timely request for hearing. On January 3, 2017, ALJ Murdock conducted a hearing at which claimant failed to appear, and on January 4, 2017 issued Hearing Decision 17-UI-74081, affirming the Department's decision. On January 10, 2017, the employer filed an application for review with the Employment Appeals Board (EAB). On January 27, 2017, EAB issued Appeals Board Decision 2017-EAB-0040, reversing and remanding the hearing decision for further development of the evidentiary record. On April 7, 2017, ALJ Murdock conducted a hearing at which claimant failed to appear, and on April 12, 2017, issued Hearing Decision 17-UI-80852, affirming the administrative decision. On April 22, 2017, the employer filed an application for review with EAB. On May 17, 2017, EAB issued Appeals Board Decision 2017-EAB-0464, affirming Hearing Decision 17-UI-80852.

On June 6, 2017, the employer submitted a written argument to EAB. EAB will exercise its discretion under ORS 657.290(3) to reconsider Appeals Board Decision 2017-EAB-0464 and address the issue raised in the written argument.

**FINDINGS OF FACT:** (1) Denicola's Restaurant employed claimant as a pizza cook from 2015 until November 2, 2016.

(2) The employer's head cook was absent for the month of July 2016, and the employer's owner changed claimant's regular schedule and assigned him to fill in for the cook for a number of shifts. Claimant forgot about the change in his schedule, however, and failed to report on time for the first shift he was scheduled to fill in for the cook. The employer was able to contact claimant and he arrived at work an hour and one-half after his shift was scheduled to begin. The owner told claimant to use his phone to "take a picture" of the new schedule, but claimant did not. 4/7/17 Hearing, Audio recording at 11:55. On July 18, 2016, claimant was scheduled to fill in for the cook; he failed to report for his shift, however, and did not notify the employer that he was going to be absent.

(3) On October 25, 2017, claimant and the manager on duty engaged in an angry argument, during which claimant told the manager that he was unhappy with the manager's performance. At some point in the argument, claimant left his work station, stepped outside to smoke a cigarette, and refused to obey the manager's directive that he return to his work station. 1/3/17 Hearing, Audio recording at 12:52.

(4) On November 2, 2016, the employer's owner discharged claimant for insubordinate behavior on October 25.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that the employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Isolated instances of poor judgment, however, are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because he engaged in insubordinate behavior on October 25, 2016. As a matter of common sense, claimant knew that the employer expected him to obey his supervisor's orders. On October 25, 2016, claimant argued angrily with the manager on duty, left his work station and stepped outside of the restaurant kitchen where he was working to smoke a cigarette, and refused to comply with the manager's directive that he get back to work. Claimant's deliberate defiance of the manager's order was at least a wantonly negligent violation of the standards of behavior the employer expected of him.

Claimant's insubordinate behavior on October 25 did not constitute misconduct as that term is defined by applicable law, however, because it was an isolated instance of poor judgment. An act is isolated if the exercise of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Isolated acts exceed mere poor judgment, and therefore do not fall within the exculpatory provisions of OAR 471-030-0038(3) only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship, or otherwise make a continued relationship impossible. OAR 471-030-0038(1)(d)(D).

The employer provided evidence of two other instances of claimant's allegedly willful or wantonly negligent behavior -- his failure to report to two scheduled shifts in July 2016. In regard to the first instance, the record shows that claimant forgot about a shift he was scheduled to work; claimant's failure to report on time for work was therefore not the result of a conscious indifference to the employer's expectations and not wantonly negligent. In regard to the second instance, claimant's absence occurred because he did not heed the employer's directive to "take a picture" of the schedule

and was therefore unaware that he was scheduled to work. However, the record fails to demonstrate that claimant's failure to "take a picture" of the schedule resulted from a deliberate refusal to obey the employer's directive rather than from simple negligence, *e.g.*, because claimant forgot. The employer therefore did not meet its burden to show that more likely than not, claimant's failure to report for a second scheduled shift in July 2016 occurred because of claimant's willful or wantonly negligent behavior in refusing to comply with the employer's order to "take a picture" of his schedule. As a result, claimant's second July absence cannot be used to establish a pattern of willful or wantonly negligent behavior.

Even if we were to consider claimant's refusal to comply with the employer's directive that he "take a picture" of his work schedule was wantonly negligent, it would not change our conclusion that the October 25 incident was an isolated instance of poor judgment. Two incidents of wantonly negligent behavior, which occurred three months apart during the approximate year claimant worked for the employer, are too infrequent to constitute a pattern of such behavior.

Claimant's insubordinate behavior on October 25 did not violate the law, and was not tantamount to unlawful conduct. Nor does the record show that, viewed objectively, claimant's behavior was so egregious that it caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. The employer presented no evidence, for example, that claimant used foul language when he argued with the manager, raised his voice to unacceptable levels that disrupted staff or could be heard by customers, or remained permanently away from his work station after disobeying the manager's directive to return to work.

In sum, we find that claimant's conduct on October 25 did not constitute disqualifying misconduct under the relevant law because it was an isolated instance of poor judgment. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-80852 is affirmed.

Susan Rossiter and D. P. Hettle;  
J. S. Cromwell, not participating.

**DATE of Service:** June 8, 2017

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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